Wan Muhammad Azrami bin Wan Zullkifli v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05(M)-43–02 OF 2021, B-05(M)-44–02 OF 2021 AND B-05(M)-51–03 OF 2021

HADHARIAH SYED ISMAIL, AZMAN ABDULLAH AND AZMI ARIFFIN JJCA

18 DECEMBER 2023

Criminal Procedure — Appeal — Appeal against conviction and sentence — First accused convicted under s 3 of Firearms (Increased Penalties) Act 1971 ('Act 37') — Second accused and third accused as accomplices convicted under s 3A of Act 37 — All accused persons sentenced to death — Whether there was discharge of firearm by first accused — Whether first accused discharged firearm at the time of committing scheduled offence — Whether first accused discharged firearm with intent to cause death or hurt to victim — Whether adverse inference ought to be invoked for failure of prosecution to produce s 112 statement — Whether prosecution's witness credible — Evidence Act 1950 ss 114(g) & 134 — Firearms (Increased Penalties) Act 1971 ss 3 & 3A

Mohd Asrizal bin Mohd Ibrahim ('OKT1') was charged under s 3 of the Firearms (Increased Penalties) Act 1971 ('Act 37') for discharging a firearm in the commission of the offence of gang-robbery with the intention to cause death or injury to one Pratap a/l Ramasamy ('PW10'). In this regard, OKT2, OKT3 and one Faisal (who had passed away) as the accomplices of OKT1 were charged under s 3A of Act 37. The offences were committed at a parking space of an apartment in Petaling Jaya. All the accused persons ('the appellants') were identified by PW10. Based on PW10's testimony, the gun was fired by OKT1 and the bullet ended up hitting OKT2. There was also evidence which showed that the appellants had rented a room in a hotel and based on the chemist's report, there was a presence of the DNA of OKT2 and OKT3 in the said hotel room from which few items were seized including a bullet. At the end of the prosecution's case, the High Court found that all the elements of the offences were proven. The High Court rejected OKT1's defence (that Faisal was the mastermind of the gang-robbery) considering that Faisal had passed away before the trial and could not appear in court to give his testimony, and after all, Faisal was not the one who fought PW10. In fact, while defending himself, OKT1 had admitted that he intended to commit gang-robbery against PW10 and had done so together with OKT2, OKT3 and Faisal. OKT1 only denied carrying the gun and having shot OKT2. As for OKT2 and OKT3, the trial court found many material discrepancies in their evidence and ruled that they were not credible witnesses. Further, their defences had also failed to rebut the

presumption of knowledge about the gun used by OKT1 during the incident. All in all, the trial court ruled that the appellants failed to cast reasonable doubt in the prosecution's case, as such, the trial court convicted the appellants and sentenced them to death, hence, the present appeals. The appellants argued that: (a) there was no evidence to clearly show that OKT1 shot the gun, it could be that PW10 or Faisal who shot the gun, and OKT2 and OK3 did not know that OKT1 was carrying or had in his possession or under his custody or control the firearm; and (b) the evidence of PW10 was not credible because there were discrepancies in his statements.

Held, dismissing the appeals on conviction, and allowing the appeals on sentence:

(1) In considering the present appeals, the court followed the Court of Appeal's earlier decision in the case of *Fairoz Azman bin Amironzuki lwn Pendakwa Raya* [2021] 2 MLJ 771 that in determining whether the firearm was discharged whilst committing robbery, the whole incident should be viewed as a single transaction. In the present case, the court found that the evidence was corroborated. It was not only the evidence by PW10 who was the victim but also the evidence from the report of the chemist which stated that there was a presence of the DNA of OKT2 and OKT3 in the hotel room from which few items were seized including the bullet which was identical to the one found at the scene. It was difficult for the court to arrive at the decision that this happened all of a sudden (see paras 32–33).

(2) The defence also failed to rebut that there was a discharged of firearm in which happened at the time of the commission of the robbery. Section 3 of Act 37 also made it clear that the offence was said to be committed notwithstanding that no hurt was caused to the victim. It was enough that there was a discharge of firearm at the time of committing or attempting to commit or abetting the commission of a scheduled offence enumerated in the Schedule to the Act which in this case a robbery. It was too bad that in this case, the shot had caused injury to OKT2. The use of gun in a robbery was a clear indication that there was an intention to cause death or serious injury to the victim and such indication of intention became unclouded when there was a discharged of firearm notwithstanding that no hurt was caused to the victim, PW10 (see para 34).

(3) With regards to OKT3's submission that an adverse inference under s 114(g) of the Evidence Act 1950 should be invoked for the failure of the prosecution to produce s 112 statement of Faisal, the court referred to the decision in the case of *Ong Hooi Beng & Ors v Public Prosecutor* [2015] 3 MLJ 812 which stated as followed: '[59] Further, even without SD7's evidence the prosecution already had sufficient evidence to establish a

prima facie case against all the appellants. Thus the failure to call him as a prosecution witness is of no consequence as it did not result in a gap in the prosecution case. It is trite law that an adverse inference cannot be drawn for failure to call a witness when the prosecution has discharged its burden'. In the present appeals, PW10 was able to give evidence of the transaction as he was the victim and the sole eyewitness. PW10 was able to inform the court of the situation at the time of the incident. He could remember OKT who sat in the car which was far from him in which this fact was not disputed by OKT (see paras 35–37).

(4) With regard to the credibility of PW10, the court was of the view that the learned High Court judge was the one who had the audio and visual advantage to observe the demeanour of the witnesses. Hence, he was clearly entitled to make findings with regard to the credibility of the witnesses. As an appellate court, the court should be slow to interfere with such findings unless it could be shown before the court that the findings were perverse and against all available evidence. In the present case, there was no reason for the court to disturb the finding of the learned High Court judge. With respect to the issue of the court accepting just a single witness to prove the case of the prosecution, it was trite that the evidence was weighed and not counted pursuant to s 134 of the Evidence Act 1950. In the present case, the learned High Court judge had not only considered the evidence of PW10 but also other corroborative evidence. Therefore, the court was not convinced that the learned High Court judge was wrong. In totality, there was no merit in the appellants' appeals on conviction (see paras 40 & 42–44).

(5) With regard to the appeals against sentence, it was trite law that when the punishment to any offence was amended to a heavier punishment, it was the intention of the parliament to perceive such offence as serious. The court was of the view that serious offence should be punished with severe punishment. However, after taking into consideration the mitigation put forward by the defence counsels of the appellants, the court agreed to set aside the sentence imposed by the High Court and sentenced the appellants to imprisonment for a term of 30 years. The court also made an order for 12 strokes of whipping to OKT1 and OKT2. No sentence of whipping to OKT3 because he had attained the age of 50 years old (see paras 45–46).

[Bahasa Malaysia summary

Mohd Asrizal bin Mohd Ibrahim ('OKT1') dituduh di bawah s 3 Akta Senjata Api (Penalti Lebih Berat) 1971 ('Akta 37') kerana melepaskan tembakan senjata api dalam melakukan kesalahan rompakan berkumpulan dengan niat untuk menyebabkan kematian atau kecederaan kepada seorang Pratap a/l Ramasamy ('PW10'). Berhubung dengan ini, OKT2, OKT3 dan seorang Faisal (yang telah meninggal dunia) sebagai rakan sejenayah OKT1 didakwa di

bawah s 3A Akta 37. Kesalahan-kesalahan tersebut dilakukan di tempat letak kereta sebuah pangsapuri di Petaling Jaya. Kesemua tertuduh ('perayu-perayu') telah dikenal pasti oleh PW10. Berdasarkan keterangan PW10, tembakan daripada senjata api tersebut dilepaskan oleh OKT1 dan peluru tersebut akhirnya mengenai OKT2. Terdapat juga keterangan yang menunjukkan perayu-perayu telah menyewa sebuah bilik di sebuah hotel dan berdasarkan laporan ahli kimia, terdapat kehadiran DNA OKT2 dan OKT3 di dalam bilik hotel tersebut yang mana beberapa barang telah dirampas termasuk sebutir peluru. Pada akhir kes pendakwaan, Mahkamah Tinggi mendapati bahawa semua elemen kesalahan-kesalahan tersebut telah dibuktikan. Mahkamah Tinggi menolak pembelaan OKT1 (bahawa Faisal adalah dalang rompakan berkumpulan tersebut) memandangkan Faisal telah meninggal dunia sebelum perbicaraan dan tidak dapat hadir ke mahkamah untuk memberikan keterangannya, dan lagipun, Faisal bukanlah orang yang bergelut dengan PW10. Malah, semasa membela diri, OKT1 telah mengakui bahawa dia berhasrat untuk melakukan rompakan berkumpulan terhadap PW10 dan telah melakukannya bersama OKT2, OKT3 dan Faisal. OKT1 cuma menafikan bahawa dia membawa pistol tersebut dan telah menembak OKT2. Bagi OKT2 dan OKT3, mahkamah perbicaraan mendapati banyak percanggahan material dalam keterangan mereka dan memutuskan bahawa mereka bukan saksi-saksi yang boleh dipercayai. Tambahan pula, pembelaan mereka juga gagal untuk menangkis anggapan pengetahuan mengenai senjata yang digunakan oleh OKT1 semasa kejadian. Secara keseluruhannya, mahkamah perbicaraan memutuskan bahawa perayu-perayu gagal menimbulkan keraguan munasabah dalam kes pendakwaan, oleh itu, mahkamah perbicaraan mensabitkan perayu-perayu dan menjatuhkan hukuman mati kepada mereka, justeru, rayuan semasa. Perayu-perayu berhujah bahawa: (a) tidak ada keterangan yang menunjukkan dengan jelas bahawa OKT1 menembak pistol tersebut, boleh jadi PW10 atau Faisal yang menembak pistol tersebut, dan OKT2 dan OK3 tidak tahu bahawa OKT1 membawa atau ada dalam milikannya atau di bawah jagaan atau kawalannya senjata api tersebut; dan (b) keterangan PW10 tidak boleh dipercayai kerana terdapat percanggahan dalam kenyataannya.

Diputuskan, menolak rayuan-rayuan ke atas sabitan, dan membenarkan rayuan-rayuan ke atas hukuman:

(1) Dalam mempertimbangkan rayuan-rayuan semasa, mahkamah mengikuti keputusan Mahkamah Rayuan sebelum ini dalam kes *Fairoz Azman bin Amironzuki lwn Pendakwa Raya* [2021] 2 MLJ 771 bahawa dalam menentukan sama ada tembakan senjata api tersebut dilepaskan semasa melakukan rompakan, keseluruhan kejadian harus dilihat sebagai satu transaksi. Dalam kes ini, mahkamah mendapati bahawa keterangan adalah disokong. Bukan sahaja keterangan oleh PW10 yang menjadi mangsa tetapi juga keterangan dari laporan ahli kimia yang menyatakan

terdapat kehadiran DNA OKT2 dan OKT3 di dalam bilik hotel tersebut yang mana beberapa barang dirampas termasuk peluru yang serupa dengan peluru yang ditemui di tempat kejadian. Sukar untuk mahkamah membuat keputusan bahawa ini berlaku secara tiba-tiba (lihat perenggan 32–33).

(2) Pihak pembelaan juga gagal menafikan bahawa terdapat pelepasan tembakan senjata api yang berlaku semasa rompakan dijalankan. Seksyen 3 Akta 37 juga menjelaskan bahawa kesalahan tersebut dikatakan dilakukan walaupun tiada kecederaan berlaku kepada mangsa. Cukuplah bahawa terdapat pelepasan tembakan senjata api pada masa melakukan atau cuba melakukan atau bersubahat melakukan kesalahan berjadual yang dinyatakan dalam Jadual Akta tersebut yang dalam kes ini merupakan kesalahan rompakan. Adalah amat malang bahawa dalam kes ini, tembakan telah menyebabkan kecederaan kepada OKT2. Penggunaan senjata api dalam rompakan adalah petunjuk jelas bahawa terdapat niat untuk menyebabkan kematian atau kecederaan serius kepada mangsa dan petunjuk niat tersebut menjadi jelas apabila terdapat tembakan senjata api yang dilepaskan walaupun tiada kecederaan yang ditimbulkan kepada mangsa, PW10 (lihat perenggan 34).

(3) Berkenaan dengan hujahan OKT3 bahawa inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 harus digunakan di atas kegagalan pihak pendakwaan untuk mengemukakan pernyataan s 112 Faisal, mahkamah merujuk kepada keputusan dalam kes *Ong Hooi Beng & Ors v Public Prosecutor* [2015] 3 MLJ 812 yang menyatakan seperti berikut: '[59] Further, even without SD7's evidence the prosecution already had sufficient evidence to establish a prima facie case against all the appellants. Thus the failure to call him as a prosecution witness is of no consequence as it did not result in a gap in the prosecution case. It is trite law that an adverse inference cannot be drawn for failure to call a witness when the prosecution has discharged its burden'. Dalam rayuan semasa, PW10 dapat memberikan keterangan mengenai transaksi tersebut kerana dia adalah mangsa dan saksi tunggal. PW10 dapat memaklumkan kepada mahkamah keadaan semasa kejadian. Dia masih ingat OKT yang duduk di dalam kereta yang jauh darinya yang mana fakta ini tidak dipertikaikan oleh OKT (lihat perenggan 35–37).

(4) Berkenaan dengan kredibiliti PW10, mahkamah berpendapat bahawa hakim Mahkamah Tinggi yang bijaksana adalah orang yang mempunyai kelebihan audio dan visual untuk memerhatikan gelagat saksi-saksi. Justeru, beliau jelas berhak membuat penemuan berhubung kredibiliti saksi-saksi. Sebagai mahkamah rayuan, mahkamah tidak harus terburu-buru mengganggu penemuan tersebut melainkan dapat ditunjukkan di hadapan mahkamah bahawa penemuan tersebut adalah songsang dan bertentangan dengan semua keterangan yang ada. Dalam

kes ini, tiada sebab untuk mahkamah mengganggu keputusan hakim Mahkamah Tinggi yang bijaksana. Berkenaan dengan isu mahkamah menerima hanya seorang saksi sahaja untuk membuktikan kes pendakwaan, adalah menjadi undang-undang yang mantap bahawa keterangan adalah ditimbang dan bukan dikira menurut s 134 Akta Keterangan 1950. Dalam kes ini, hakim Mahkamah Tinggi yang bijaksana bukan sahaja mempertimbangkan keterangan PW10 tetapi juga keterangan sokongan lain. Oleh itu, mahkamah tidak yakin bahawa hakim Mahkamah Tinggi yang bijaksana telah terkhilaf. Secara keseluruhannya, tiada merit dalam rayuan-rayuan perayu-perayu atas sabitan (lihat perenggan 40 & 42–44).

(5) Berkenaan dengan rayuan-rayuan terhadap hukuman, adalah menjadi undang-undang yang mantap bahawa apabila hukuman kepada mana-mana kesalahan dipinda kepada hukuman yang lebih berat, adalah menjadi hasrat parlimen untuk menganggap kesalahan tersebut sebagai serius. Mahkamah berpandangan bahawa kesalahan berat perlu dihukum dengan hukuman berat. Bagaimanapun, selepas mengambil kira mitigasi yang dikemukakan oleh peguam bela perayu-perayu, mahkamah bersetuju untuk mengenepikan hukuman yang dijatuhkan oleh Mahkamah Tinggi dan menjatuhkan hukuman penjara selama tempoh 30 tahun kepada perayu-perayu. Mahkamah juga memerintahkan 12 sebatan kepada OKT1 dan OKT2. Tiada hukuman sebat kepada OKT3 kerana umurnya telah mencapai 50 tahun (lihat perenggan 45–46).]

Cases referred to

Fairoz Azman bin Amironzuki lwn Pendakwa Raya [2021] 2 MLJ 771; [2021] 1 LNS 108, CA (folld)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Ong Hooi Beng & Ors v PP [2015] 3 MLJ 812; [2015] 1 LNS 63, CA (refd)

PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (folld)

PP v Ong Poh Cheng [1996] 4 MLJ 279; [1996] 1 CLJ 501, HC (refd)

Radin Irwan Iskandar bin Isagani lwn Pendakwa Raya [2017] 5 MLJ 736, CA (refd)

Yong Kar Mun v PP [2012] 6 MLJ 209, CA (folld)

Legislation referred to

Evidence Act 1950 ss 114(g), 134

Firearms (Increased Penalties) Act 1971 ss 3, 3A

Appeal from: *Pendakwa Raya lwn Mohd Asrizal bin Mohd Ibrahim dan lain-lain* [2021] MLJU 848 (High Court, Shah Alam)

Salim Bashir (with Najihah Zulkifli) (Salim Bashir, Ruswiza & Co) in Criminal Appeal No B-05(M)-43–02 of 2021 for the appellant.
Sreekant Pillai (Sreekant Pillai) in Criminal Appeal No B-05(M)-44–02 of 2021 for the appellant.
Afifuddin bin Ahmad Hafifi (with Muhammad Amirrul bin Jamaluddin) (Salehuddin Saidin & Assoc) Criminal Appeal No B-05(M)-51–03 of 2021 for the appellant.
Mohd Fairuz bin Johari (Attorney General's Chambers) in Criminal Appeal Nos B-05(M)-43–02 of 2021, B-05(M)-44–02 of 2021 and B-05(M)-51–03 of 2021 for the respondent.

Azman Abdullah JCA (delivering judgment of the court):

INTRODUCTION

[1] There are three separate appeals before this court emanating from the decision of the High Court dated 17 February 2021 in convicting and sentencing the appellants.

[2] At the High Court, the trial involved four accused as follows:

(a) Mohd Asrizal bin Mohd Ibrahim (appellant in Appeal No B-05(M)-44–02 of 2021 and hereinafter will be referred to as 'OKT1');

(b) Wan Muhammad Azrami bin Wan Zulkifli (appellant in Appeal No B-05(M)-43–02 of 2021 and hereinafter will be referred to as 'OKT2');

(c) Ahmad Faisal bin Muda (discharged not amounting to acquittal on 5 October 2017 due to the reason that the accused had been died); and

(d) Mat Salleh bin Noh (appellant in Appeal No B-05(M)-51–03 of 2021 and hereinafter will be referred to as 'OKT3').

[3] OKT1 was charged as follows:

> Bahawa kamu pada 28/9/2015, jam lebih kurang 1930 hrs bertempat di tempat letak kereta Blok D, Apartment Mentari Court, Jalan PJS 8/9, Petaling Jaya, di dalam daerah Petaling, dalam Negeri Selangor Darul Ehsan, telah didapati melepaskan tembakan senjata api semasa melakukan rompakan berkumpulan dengan niat hendak menyebabkan kematian atau kecederaan ke atas Pratap a/l Ramasamy No K/P: 831003–06–5297. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 3 Akta Senjata Api (Penalti Lebih Berat) 1971.

[4] OKT 2 was charged as follows:

A Bahawa kamu bersama-sama dengan (1) orang yang telah meninggal dunia dan Mat Salleh bin Noh (No K/P: 710729–03–5141) pada 28/9/2015, jam lebih kurang 1930 hrs bertempat di tempat letak kereta Blok D, Apartment Mentari Court, Jalan PJS 8/9, Petaling Jaya, di dalam daerah Petaling, dalam Negeri Selangor Darul Ehsan, semasa melakukan rompakan berkumpulan dengan seorang rakan kamu
B nama Mohd Asrizal bin Mohd Ibrahim Yong (No K/P: 850609–03–6179) telah melepaskan tembakan senjata api dengan niat hendak menyebabkan kematian atau kecederaan ke atas Pratap a/l Ramasamy No K/P: 831003–06–5297 yang mana kamu mempunyai pengetahuan rakan kamu membawa senjata api semasa melakukan rompakan. Oleh yang demikian kamu telah melakukan suatu kesalahan
C yang boleh dihukum di bawah seksyen 3A Akta Senjata Api (Penalti Lebih Berat) 1971.

[5] While OKT3 was charged as follows:

D Bahawa kamu bersama-sama dengan (3) orang lagi yang telah dituduh, pada 28/9/2015, jam lebih kurang 1930 hrs bertempat di tempat letak kereta Blok D, Apartment Mentari Court, Jalan PJS 8/9, Petaling Jaya, di dalam daerah Petaling, dalam Negeri Selangor Darul Ehsan, semasa melakukan rompakan berkumpulan dengan seorang rakan kamu nama Mohd Asrizal bin Mohd Ibrahim Yong (No K/P: 850609–03–6179) telah melepaskan tembakan senjata api dengan niat hendak
E menyebabkan kematian atau kecederaan ke atas Pratap a/l Ramasamy No K/P: 831003–06–5297 yang mana kamu mempunyai pengetahuan rakan kamu membawa senjata api semasa melakukan rompakan. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 3A Akta Senjata Api (Penalti Lebih Berat) 1971.

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[6] At the conclusion of the trial, the learned High Court judge found that all the appellants guilty the charges. The appellants were sentenced to death by hanging.

G **[7]** Aggrieved with the conviction and sentence, the appellants now appealed to this court. We heard the appeals on the 17 August 2023. At the conclusion of the submissions, we dismissed the appellants' appeal on conviction but we allowed the appeals on sentence. We now provide our reasons for the decision.

H

THE PROSECUTION'S CASE

[8] The prosecution's case was established by the evidence of its witnesses and accepted by the learned trial judge. Put in a nutshell, appellants were
I charged with an offence under the Firearms (Increased Penalty) Act 1971 (Act 37) ('the FIPA').

[9] OKT1 was charged under s 3 of FIPA of discharging a firearm in the commission of an offence (a gang-robbery) with the intention to cause death or

injury to one Pratap a/l Ramasamy ('PW10'). OKT2 and OKT3 being the accomplices in the case of discharge of the firearm committed by OKT1 were charged under s 3A of the same Act. Another accused, Ahmad Faisal bin Muda, has died and he was discharged without acquittal ('DNAA') by another High Court judge on 5 October 2017.

[10] The offence was committed on 28 September 2015 at approximately 7.30pm at the parking lot of Blok D, Apartment Mentari Court, Jalan PJS 8/9, Petaling Jaya, Selangor Darul Ehsan.

[11] When PW10 was about to enter his car and put his laptop in the back, he saw three men get out of the Viva car who then came towards him. One of the men came from the front (who was identified as OKT1 by PW10) while the other two men from the back. PW10 still recognise and remember the faces of the two men who came from behind and approached him where one of the men was identified as OKT2 while the other man was the accused who had died.

[12] While OKT1 was holding the gun and pointed it at PW10's chest, there was a struggle between them which resulted in OKT1 firing a shot using the gun. However, it was a bad break. The shot hit OKT2's thigh and caused injury.

[13] After the shot, PW10 managed to grab the gun from OKT1's hands and distanced himself from the accused. OKT1 and another accused (who had died) managed to escape in the Viva car where there was a driver waiting for them in the car. PW10 identified the man who was driving the Viva car during the incident as OKT3. According to PW10, the identification of OKT3 could be made because the mirror of the Viva car was almost completely open during the incident and PW10 could see the face of OKT3.

[14] OKT2 who suffered an injury to his thigh as a result of being shot by OKT1 was unable to escape. OKT2 did tried to escape from the scene by jumping down to the ground floor of the parking building and hiding in the area near the parking building but PW10 managed to find him.

[15] The investigation officer ('SP6') and his team arrived at the scene at approximately 11.45 pm and collect the following items such as a pair of samba black/brown slippers size 10, a blue t-shirt with a round collar (size XL) and blood swabbing taken from the traces of blood drops found on the wall of the corridor outside the parking lot at the second floor, on the roof of the silver colored Perodua Kancil with registration No: WHP 2986 which parked at the side of the parking building and on the red cone located near the fence.

[16] After the investigation at the scene, SP6 and his team were instructed to

A continue the investigation and went to Room No 207, second floor, Sun Beans Hotel ('the hotel room') which is located at Jalan PJS 8/11, Dataran Mentari, Petaling Jaya, Selangor (located approximately 100 meters from the scene). Police investigation showed that the hotel room had been rented by the accused before the incident. SP6 and his team arrived at the hotel room at approximately 12.40am on 29 September 2015. Upon investigation, SP6 and his team found the following items:

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(a) a yellow bullet written S & B 9 x 19 13 on the queen mattress;

C (b) a brown trousers of the brand 'Bontton' size 31/32 on a brown carpet floor;

(c) a short-sleeved collared shirt with 'Universiti Malaya' written on it stuck on the handle of the cupboard door;

D (d) two white cigarette butts on the brown carpet floor;

(e) two brown cigarette butts on the brown carpet floor;

(f) three fingerprints (F1 to F3) on a cut of a transparent plastic bottle; and

E (g) one fingerprint impression (F4) on the green colored plastic written 'merceti' in the room.

[17] All the items seized was sent to the chemist namely SP12. Based on the report of SP12, there was a presence of the DNA of OKT2 and OKT3 which show that both of them were in the hotel room before the incident together with the deceased accused.

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[18] For the complete facts on the investigation by the police, we respectfully relied on the grounds of judgment by the learned High Court judge who had outlined the material facts of prosecution case.

G

FINDING OF THE LEARNED TRIAL JUDGE AT THE CLOSE OF THE PROSECUTION'S CASE

H **[19]** At the end of the prosecution case, the key findings of the learned trial judge are best summed up as follows:

(a) with regard to OKT1, the learned High Court judge satisfied that the prosecution had proved all the elements of the offence which are as follows:

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(i) OKT1 had discharged a firearm;

(ii) OKT1 had discharged a firearm at the time of his committing or attempting to commit or abetting the commission of a scheduled offence; and

(iii) OKT1 had discharged a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused.

(b) the elements were proven by an overwhelming evidence of PW10 and PW6 (Insp Nor Harman bin Ab Hamid). The learned High Court judge was of the view that OKT1 has the intention to cause death or injury to PW10 based on the inference if PW10 had not cooperated or resisted or refused to hand over his belongings to OKT1, he would have been shot by OKT1. OKT1 used the gun ('P21A') which the evidence showed that it is functional. The shot was fired by OKT1 and caused injury to OKT2;

(c) on the charge against OKT2 and OKT3, the learned High Court judge held that the prosecution had successfully proved their case in which all the elements of the offence were satisfied. The elements are:

(i) a firearm is discharged by any person at the time of his committing or attempting to commit or abetting the commission of a scheduled offence;

(ii) a firearm is discharged with intent to cause death or hurt to any person;

(iii) each of the accomplices in respect of the offence present at the scene of the commission or attempted commission or abetment;

(iv) each of the accomplices may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm; and

(v) unless there is prove that the accomplices had taken all reasonable steps to prevent the discharge.

(d) evidence by PW10 showed that all the accused were at the scene and committed a gang-robbery on PW10. PW10 also confirmed that OKT2, OKT3 and Faisal (the deceased accused) failed to take all reasonable steps to prevent OKT1 from firing the gun; and

(e) the learned High Court judge also made a finding that PW10 is a credible witness and his testimony was accepted by the High Court after a maximum assessment of his credibility and trustworthiness. In fact, according to the learned High Court judge, SP10 is a victim of this incident and has testified honestly about what happened to him during the incident.

[20] Therefore, the learned High Court judge found a prima facie case had been established by the prosecution against all the appellants and ordered the appellants to enter their defence.

A DEFENCE

[21] OKT1 gave his evidence on oath. OKT1's defence was as follows:

(a) OKT 1 telah menerima panggilan telefon daripada kawannya bernama Faisal (tertuduh yang telah meninggal dunia). Beliau meminta OKT1 datang berjumpanya di tempak letak kereta Blok E di Mentari Court. Faisal (tertuduh yang telah meninggal dunia) tinggal di Mentari Court di Blok C.

(b) Atas permintaan Faisal, OKT1 telah pergi ke tempat letak kereta Blok E tersebut dan melihat Faisal sudah berada di situ bersama OKT2 dan OKT3. Faisal memberitahu ada satu 'job'. Nama 'pusher' tidak diketahui.

(c) Dekat waktu magrib, mereka melihat seorang lelaki India (SP10) datang ke situ. OKT1 melihat Faisal terus pergi ke arah lelaki India tersebut dan kemudianya melihat Faisal dan lelaki India tersebut bergelut. OKT1 mendengar Faisal menjerit kepada lelaki India tersebut dan meminta dadah dan wang daripada lelaki India tersebut. Lelaki India tersebut seorang 'pusher' dadah. OKT1 tidak mengenali lelaki India tersebut.

(d) Semasa Faisal dan lelaki India itu bergelut, OKT1 datang menghampiri mereka dari arah belakang dan pergi ke sebelah kiri manakala OKT2 berada di sebelah kanan mereka. Semasa itu, OKT1 terdengar bunyi satu letupan dan melihat OKT2 jatuh di situ. OKT1 tiada pengetahuan punca letupan dan apa yang telah berlaku. OKT1 tiada pengetahuan dan tidak nampak Faisal membawa pistol di tempat kejadian. OKT1 tidak nampak sesiapa memegang pistol di tempat kejadian.

(e) OKT1 menafikan memegang pistol di tempat kejadian dan tidak pernah tengok atau memegang pistol (P21A) tersebut sebelum kejadian. OKT1 tidak membawa pistol tersebut ke tempat kejadian.

(f) OKT1 mengaku hendak melakukan samun tetapi menafikan menggunakan pistol tersebut dan menafikan ada melepaskan tembakan menggunakan pistol tersebut.

(g) OKT1 menyatakan pistol tersebut dipunyai oleh Faisal. Selepas ditangkap polis dan semasa berada di dalam lokap, Faisal memberitahu OKT1 bahawa pistol tersebut milikinya. Faisal telah meninggal dunia kerana sakit dalam perut.

(h) Faisal tinggal di Blok C di Mentari Court dan polis telah menangkap Faisal di situ. Faisal datang dengan polis ke rumah OKT1 dan polis telah menangkap OKT1.

(i) OKT1 tidak pernah pergi ke Hotel Sun Beans dan tiada pengetahuan siapa yang menyewa di bilik hotel tersebut.

(j) Pihak polis tidak merampas pistol tersebut daripada OKT1. Pihak polis telah merampas pistol tersebut daripada lelaki India tersebut.

[22] OKT2 gave an unsworn statement and his defence was as follows:

(a) Pada 28.09.2015, OKT2 bersama OKT1 dan OKT3 berada di Restoran Subaidah di Sungai Way untuk makan malam. Selepas makan malam, pada jam lebih kurang 7.30 malam, mereka telah pergi ke Blok E di Mentari Court, Sunway dengan menaiki kereta Perodua Viva yang dipandu oleh OKT3 untuk berehat di rumah OKT1.

(b) Semasa di dalam kereta, OKT1 telah menerima panggilan telefon daripada seorang kawannya yang bernama Faisal (tertuduh yang telah meninggal dunia) untuk datang ke tempat letak kereta Blok E di Mentari Court untuk berjumpa dengan Faisal. OKT1 dan Faisal adalah kawan dan OKT2 juga mengenali Faisal melalui OKT1.

(c) Apabila masuk ke dalam kawasan letak kereta Blok E di Mentari Court, tertuduh kedua nampak Faisal keluar dari tangga tempat letak kereta dan berjalan menuju ke arah seorang lelaki India yang juga berada di situ.

(d) Sampai di situ, OKT1 dan OKT2 keluar dari kereta Perodua Viva tersebut. Tiba-tiba OKT2 nampak pergelutan di antara Faisal dan lelaki India itu. OKT3 tidak keluar dan berada di dalam kereta Perodua Viva tersebut pada setiap masa dan duduk di bahagian pemandu kereta Perodua Viva tersebut.

(e) OKT2 terus pergi menolong meleraikan pergelutan di antara Faisal dan lelaki India itu. Semasa berbuat demikian, OKT2 terdengar satu bunyi seumpama tembakan dan terus jatuh di atas lantai. Selepas jatuh di atas lantai, OKT2 nampak peha kanannya terkena tembakan. OKT2 terus merangkak ke belakang sebuah kereta di tempat letak kereta tersebut dan pada masa itu nampak satu benda seumpama pistol di atas lantai. Lelaki India tersebut mengambil benda (pistol) tersebut dan mengacukan kepada kepala OKT2 dan ini menyebabkan tertuduh kedua berasa takut.

(f) Pada masa itu, OKT2 nampak OKT1 melarikan diri dari situ dengan menaiki kereta Perodua Viva dan bergerak keluar dari kawasan letak kereta tersebut OKT2 tidak nampak Faisal pergi ke mana selepas kejadian tersebut.

(g) OKT2 tiada pengetahuan sebab pergelutan di antara Faisal dan lelaki India tersebut Lelaki India itu menanyakan tertuduh kedua datang dari mana dan memijak peha kanan tertuduh kedua yang cedera dan menyebabkan OKT2 menjerit kesakitan.

(h) OKT2 yang tidak dapat berjalan telah berjaya merangkak sehingga ke tangga dan berguling ke balkoni di tingkat 3 tempat letak kereta tersebut dan kemudian terjun ke bawah dan mendarat di atas sebuah kereta kancil.

(i) OKT2 masih cuba merangkak ke arah satu tiang lampu dan lelaki India tersebut memukul tertuduh kedua. Tidak lama kemudian, polis tiba di kawasan tersebut dan membawanya ke Pusat Perubatan Universiti Malaya untuk rawatan.

(j) OKT2 tiada pengetahuan mengenai kewujudan pistol dan peluru yang digunakan dalam kes ini sebelum, semasa dan selepas kejadian tembakan berlaku.

[23] OKT3 gave his evidence on oath and his defence version was as follows:

(a) OKT3 berusia 49 tahun dan mempunyai lebih kurang 30 buah kedai di kawasan Rantau Panjang, Kelantan yang disewakan kepada penyewa-penyewa.

(b) Pada 28/9/2015, OKT3 bersama dengan OKT2 bertolak dari Kelantan ke Kuala Lumpur. OKT2 mencadangkan mereka menyewa kereta untuk ke Kuala Lumpur. Kereta tersebut disewa atas nama OKT3 kerana OKT3 mempunyai lesen memandu.

(c) Sampai di Kuala Lumpur, pada jam lebih kurang 6.30 petang, OKT2 telah menerima panggilan telefon daripada seorang kawannya bernama Faisal. Faisal telah meminta OKT2 dan OKT3 pergi ke tempak letak kereta di Blok D Mentari Court.

(d) Sampai di tempat letak kereta di Mentari Court, OKT3 melihat OKT1 dan Faisal telah berada di situ.

(e) OKT2 telah turun dari kereta Viva tersebut dan Faisal pula mengarahkan OKT3 pergi meletakkan kereta Viva yang dipandunya di tempat letak kereta di situ. OKT3 diberitahu oleh Faisal bahawa ada 'Job' untuk dilakukan tetapi tidak memberitahu tertuduh ketiga apakah 'Job' tersebut.

(f) Atas arahan OKT1, OKT3 telah meletakkan keretanya pada jarak lebih kurang 50 meter dari tempat beliau berjumpa dengan Faisal dan menunggu di dalam kereta Viva tersebut. Semasa menunggu lebih kurang 30 minit di dalam kereta Viva tersebut, OKT3 terdengar bunyi letupan macam tayar meletup. OKT3 berasa takut mendengar bunyi letupan tersebut dan menunggu lebih kurang 15 minit di situ sebelum memandu kereta Viva turun dari bangunan letak kereta dan beredar dari situ.

(g) OKT3 tidak membawa pistol (P21A) tersebut dan tiada pengetahuan siapa yang membawa pistol tersebut ke situ.

(h) OKT3 juga tiada pengetahuan mengenai pistol yang digunakan oleh OKT1 semasa kejadian tersebut.

(i) OKT3 tidak terlibat dalam samun berkumpulan dengan bersenjatakan pistol tersebut.

[24] The defence also called another witness, Muhammad Ridhuan bin Abdul Razak ('DW4'). Evidence by DW4 was as follows:

(a) Pada 28/9/2015, jam lebih kurang 6.30 hingga 7.30 malam, SD4 berada di Sunway Mentari tetapi tidak ingat rumah yang beliau berada. SD4

berehat (lepak) Bersama kawannya bernama Hasif dan telah bertemu dengan OKT1. SD4 mengenali OKT1 sejak awal tahun 2015 dan dapat mengecam OKT1 di Mahkamah. A

(b) OKT1 telah menerima panggilan telefon daripada seorang kawannya bernama Faisal. SD4 melihat muka OKT1 berubah dan OKT1 keluar dari rumah untuk berjumpa Faisal. OKT1 tidak memberitahu SD4 mengapa Faisal mahu berjumpa OKT1. SD4 juga mengenali Faisal dan pernah berjumpa dengan Faisal sebelum ini. B

(c) Selepas lebih kurang 30 hingga 40 minit kemudian, SD4 melihat OKT1 balik ke rumah dan kelihatan kelam-kabut dan gelisah. Apabila ditanya oleh SD4 mengapa OKT1 dalam keadaan begitu, OKT1 menjawab tiada apa-apa dan terus masuk ke dalam biliknya. C

(d) Selepas itu, SD4 pun balik ke rumahnya. Pada keesokan harinya di sebelah tengahari, SD4 menerima panggilan telefon daripada Hasif yang memberitahu OKT1 telah ditangkap polis kerana terlibat dalam kes samun. D

(e) SD4 menyatakan yang semasa SD4 berada di rumah OKT1 bersama Hasif, SD4 tidak nampak OKT1 memegang atau membawa apa-apa senjata dan nampak OKT1 keluar dari rumah berjumpa Faisal dalam keadaan sehelai sepinggang. E

(f) Walaupun SD4 dan OKT1 berkawan, SD4 tidak pernah diminta oleh tertuduh pertama memberikan keterangan sedemikian di mahkamah.

FINDING OF THE LEARNED TRIAL JUDGE AT THE END OF THE DEFENCE'S CASE F

[25] At the conclusion of the trial, it was the finding of the learned trial judge that the defence had failed to cast a reasonable doubt on the prosecution's case. Consequently, the appellants were convicted for the offence as per the charges. G

[26] The learned High Court judge, in coming to his decision, held as follows:

(a) the OKT1's defence basically was on the allegation that Faisal (the deceased accused) was the mastermind of the gang-robbery against PW10. In this regard, the learned High Court judge was of the view that Faisal had died before the trial and it was easy for the appellants to put all the blame on Faisal as he could not appear in court to give his testimony. During the incident, Faisal is not the one who have fight with PW10. Besides, while defending himself, OKT1 had admitted that he intended to commit gang-robbery against PW10 and had done so together with OKT2, OKT3 and Faisal (the deceased accused). OKT1 only denied carrying the gun and having shot OKT2; H I

(b) with regard to the defence made by OKT2, the learned High Court judge found that there were many material discrepancies in OKT2's statement as compared to the statement led by OKT1 and OKT3. Those material contradictions have affected the defense of OKT2 and as such the court found that OKT2 is not a credible witness. OKT2's defense has also failed to rebut the presumption of knowledge about the gun used by OKT1 during the incident and on the balance of probabilities failed to cast reasonable doubt in the prosecution's case;

(c) the defence of OKT3 was that he was 50 meters from where the fight took place and thus he had no knowledge that OKT1 carrying or had in his possession or under his custody or control of the firearm. The learned High Court judge upon considering the matter hold the same view as for OKT2 that there were many material discrepancies in the statement of OKT3. Such material contradictions have affected his defense. Therefore, the court was of the view that OKT3 is not a credible witness and his defense failed to rebut the presumption of knowledge about the gun used by OKT1 during the incident. On the balance of probabilities, OKT3 failed to cast reasonable doubt in the prosecution's case; and

(d) based on the aforesaid reasons, the learned High Court judge convicted the appellants for the offences as per charges and the appellants were sentenced to death by hanging.

THIS APPEAL

[27] Before us are three appeals with three different petition of appeal. However, grounds that is submitted before us may be summarised as follows:

(a) the defence of the appellants had raised reasonable doubt to the prosecution's case. OKT1 did not fire or cause death or injury to PW10 and was merely an attempt to rob PW10. There is no evidence to clearly show that OKT1 shot the gun. It could also be PW10 or Faisal that shot the gun that caused the injury to OKT2. OKT2 and OKT3 did not that know that OKT1 was carrying or had in his possession or under his custody or control the firearm; and

(b) the evidence of PW10 is not credible. There are discrepancies in his statements.

OUR DECISION

[28] It is first apposite that ss 3 and 3A of the FIPA be stated as follows:

> 3 Penalty for discharging a firearm in the commission of a scheduled offence
>
> Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause

death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with imprisonment for a term of not less than thirty years but not exceeding forty years and with whipping with not less than twelve strokes.

3A Penalty for accomplices in case of discharge of firearm

Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing or attempting to commit or abetting the commission of a scheduled offence, each of his accomplices in respect of the offence present at the scene of the commission or attempted commission or abetment thereof who may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm shall, notwithstanding that no hurt is caused by the discharge thereof, be punished with imprisonment for a term of not less than thirty years but not exceeding forty years and with whipping with not less than twelve strokes, unless he proves that he had taken all reasonable steps to prevent the discharge.

Issue (i): The defence of the appellants had raised reasonable doubt to the prosecution's case

[29] It was submitted by the counsels of all the appellants that their defence had raised doubt to the prosecution's case.

[30] In this regard, for OKT1, the counsel submitted that OKT1 is not the one who shot the gun. It could also be PW10 or Faisal (the deceased accused) who shot the gun. Thus, this followed by the submission of OKT2 and OKT3 that both did not that know that OKT1 was carrying or had in his possession or under his custody or control the firearm. The learned counsel had referred to the case of *Public Prosecutor v Ong Poh Cheng* [1996] 4 MLJ 279; [1996] 1 CLJ 501 on whether discharge of the firearm was an act separate and distinct from the robbery as follows:

The accused discharged his firearm not at his victims and it was not proved that the accused discharged a firearm at the time of committing the robbery.

[31] We have considered the appellants' defence and their submission. However, we are constraint to depart from the finding of the learned High Court judge. We refer to the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 which held as follows:

Generally, an appellate court will not intervene unless the trial court was shown to be plainly wrong in arriving at its decision or where there had been no or insufficient judicial appreciation of the evidence. Judicial appreciation of evidence meant that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any

A motive that a witness may have in giving his evidence. Where contemporary documents existed, he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. The principle central to appellate interference is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal.

B

[32] In considering these appeals, we follow this court's earlier decision in the case of *Fairoz Azman bin Amironzuki lwn Pendakwa Raya* [2021] 2 MLJ 771; [2021] 1 LNS 108 in which His Lordship Abdul Karim Abdul Jalil JCA stated that in determining whether the firearm was discharged whilst committing C robbery, the whole incident should be viewed as a single transaction.

[33] When we evaluated the facts and evidence in this case, we found that the evidence was corroborated. It is not only the evidence by PW10 who is the victim in this case but also evidence from the report of SP12 stated that there D was a presence of the DNA of OKT2 and OKT3 in the hotel room from which few items were seized including the bullet which is identical to the one found the scene. It is difficult to arrive at the decision hat this happen all of a sudden.

E **[34]** The defence also failed to rebut that there is a discharged of firearm in which happened at the time of the commission of the robbery. Section 3 of the FIPA also makes it clear that the offence is said to be committed notwithstanding that no hurt is caused to the victim. It is enough that there is a discharged of firearm at the time of committing or attempting to commit or abetting the commission of a scheduled offence enumerated in the Schedule to F the Act which in this case a robbery. It is too bad that in this case, the shot had caused injury to OKT2. The use of gun in a robbery is a clear indication that there is an intention to cause death or serious injury to the victim and such indication of intention becomes unclouded when there is a discharged of firearm notwithstanding that no hurt is caused to the victim, PW10. G

[35] The counsel for OKT3 also submitted that an adverse presumption under s 114(g) of the Evidence Act 1950 should be invoked in this case on the reason that the prosecution failed to prove that the gun belongs to any H appellants. All the appellants suggested that it Faisal (the deceased accused) who might bring the gun to the scene in which they had no knowledge about it. The prosecution was said failed to produce 112 statement of Faisal.

[36] In this regard, we refer to the case of *Ong Hooi Beng & Ors v Public* I *Prosecutor* [2015] 3 MLJ 812; [2015] 1 LNS 63, in which Abdul Rahman Sebli JCA (as he then was) stated as follows:

> [59] Further, even without SD7's evidence the prosecution already had sufficient evidence to establish a prima facie case against all the appellants. Thus the failure to call him as a prosecution witness is of no consequence as it did not result in a gap in

the prosecution case. It is trite law that an adverse inference cannot be drawn for failure to call a witness when the prosecution has discharged its burden. As Yong Pung How CJ said in *Chua Keem Long v Public Prosecutor* [1996] 1 SLR 510 at pp 523–524:

> The appellant's contention is that the failure of the prosecution to adduce evidence of those other gamblers meant that the court could presume that the evidence would have gone against the prosecution, that is there were no such visits.
>
> Such arguments are commonly made, commonly too, such arguments are without merit. The court must hesitate to draw any such presumption unless the witness not produced is essential to the prosecution's case. Any criminal transaction may be observed by a number of witnesses. It is not necessary for the prosecution to produce every single one of those witnesses. All the prosecution need to do is to produce witnesses whose evidence can be believed so as to establish the case beyond reasonable doubt. Out of a number of witnesses, it may then only be necessary to bring in one or two; as long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all the rest should be called, nor why any presumption should be drawn that the evidence of those witnesses not produced would have been against the prosecution.

[37] In our present appeals, PW10 was able to give evidence of the transaction as he was the victim and the sole eye witness. PW10 able to inform the court the situation at the time of the incident. He can remember OKT who sat in the car which far from him in which this fact is not disputed by OKT. This issue is also related to the next issue on the credibility of PW10.

Issue (ii): The evidence of PW10 is not credible

[38] All the counsel of the appellants raised this issue on the point that the learned High Court judge was in error in relying on the evidence of PW10 in which we are aware that PW10 is the only eye witness for the prosecution. The appellants contended that there are discrepancies in the evidence led by PW10, to name a few, PW10 in his testimony during the examination in chief stated that when the gun was pointed at him, OKT2 had asked for the bag to be handed over to his colleague on the left and during the cross-examination, PW10 said that when he tried to push away the gun, a shot was fired. However, in contradiction, during the re-examination when PW10 was asked by the prosecutor to explain why he did not agree that the shooting happened by accident, PW10 then changed his evidence by saying that the accused had already tried to shoot when the pistol was pointed.

[39] The learned counsel for OKT1 drawn this court attention to the case of *Radin Irwan Iskandar bin Isagani lwn Pendakwa Raya* [2017] 5 MLJ 736 which held as follows:

A [22] Berdasarkan penelitian kami kepada rekod rayuan dan penghakiman hakim bicara, kami bersetuju bahawa hakim bicara telah bergantung sepenuhnya kepada keterangan lisan SP12 dalam mensabitkan perayu dengan pertuduhan. Hakim bicara telah menerima keterangan SP1 secara bulat-bulat dan atas nilai muka ('face value') tanpa membuat pertimbangan terhadap fakta bahawa SP1 seorang saksi B yang berkepentingan. Daripada keterangan yang telah diberikan oleh SP1 sendiri serta berdasarkan kepada keseluruhan keterangan dalam kes di hadapan kami, tidak syak lagi bahawa SP1 adalah seorang saksi yang mempunyai kepentingan dalam kes ini. Keterangan SP1 sewajarnya diteliti dan diterima dengan secara berhati-hati oleh hakim bicara dan keterangan saksi sedemikian wajar memerlukan keterangan yang lain sebagai sokongan. Pada pandangan kami, keterangan SP1 bukanlah keterangan C yang kukuh untuk membuat sabitan ke atas perayu oleh hakim bicara menjadi satu dapatan dan keputusan yang selamat untuk dipertahankan.

[40] With regard to this issue, we are of the view that the learned High Court D judge is the one who had the audio and visual advantage to observe the demeanour of the witnesses. Hence, he was clearly entitled to make findings with regard to the credibility of the witnesses. As an appellate court, we should be slow to interfere with such findings unless it can be shown before us that the findings were perverse and against all available evidence. In the present case, we E see no reason to disturb the finding of the learned High Court judge.

[41] We are guided by the decision of Raja Azlan Shah FJ (as His Highness then was) in the case of *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 which stated that:

F

> ... In my opinion, the discrepancies there will always be, because in the circumstances in which events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. The question is whether existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either G be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and reject the other. In the absence of any contradiction, however, and in the absence of any inherent improbability, the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

H

[42] As to whether the court accept just a single witness to prove the case of the prosecution? It is trite that the evidence is weighed and not counted pursuant to s 134 of the Evidence Act 1950. The law is clear that 'No particular I number of witnesses shall in any case be required for the proof of any fact'. In Ratanlal and Dhirajlal's, *Law of Crimes* (27th Ed) at pp 1965–1969, it stated that, 'It is now a well settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence'.

[43] Coming back to our case, the learned High Court judge had not only considered the evidence of PW10 but also other corroborative evidence. Therefore, we are not convinced that the learned High Court judge was wrong.

CONCLUSION

[44] In the upshot, having perused the appeal records, the grounds of judgment and the written submissions by parties and based on the aforesaid reasons, we unanimously find that there is no merit in the appellants' appeals on conviction. All appeals on conviction are hereby dismissed.

[45] With regard to the appeals against sentence, it is trite law that when the punishment to any offence is amended to a heavier punishment, it is the intention of the Parliament to perceive such offence as serious. Therefore, in arriving to our decision for appeal against sentence in these appeals, we are guided by the decision Abdul Malik Ishak JCA in the case of *Yong Kar Mun v Public Prosecutor* [2012] 6 MLJ 209 as follows:

> [82] We will now refer to the Hansard in order to understand the true purpose and intention of the Act. At the third Parliamentary sitting of the 'Dewan Ra'ayat' (House of Representatives) on 27 July 1971, the Honourable Attorney General Tan Sri Abdul Kadir bin Yusof ('AG') said at p 3850 of the Hansard:
>
> > What we are bringing here is an amendment for an enhanced, a higher, penalty for committing robbery and kidnapping and other offences as stated there, four types, if they used firearms; if they used penukul, paku, or parang or any other weapon it is just like ordinary crime. But what we are going to kill is the use of firearms, bomb and grenade, when committing crimes because this is on the increase now.
>
> ...
>
> [85] From the debates in Parliament as seen from the Hansard, the Act was born out of necessity, so to speak, to curb the use of firearms to commit 'armed payroll hold-ups, leading either to death or injury'.
>
> ...
>
> [86] On the facts, it is a gross miscarriage of justice not to convict the appellant for committing the offence as per the amended charge in exh 'P112'.

[46] Therefore, we are of the considered view that serious offence should be punished with severe punishment. However, after taking into consideration the mitigation put forward by the defence counsels of the appellants, we agree to set aside the sentence imposed by the High Court and sentence the appellants with an imprisonment for a term of 30 years. We also make an order for 12 strokes of whipping to OKT1 and OKT2. No sentence of whipping to OKT3 because he had attained the age of 50 years old.

Appeals on conviction dismissed; appeals on sentence allowed.

Reported by Dzulqarnain Ab Fatar